



## Statutory Right to Name a Guardian

By: Martha J. Hartney, Esq.



Every state provides a statutory right for parents to name a guardian. When parents don't name a guardian, and tragedy strikes, it becomes the judge's job to decide who will raise a child. If parents haven't named a successor, a court will appoint a guardian, without the knowledge parents have of their children and potential guardians. That someone may not be the person parents choose.

When working with international families, the need for good planning is amplified. What will you, as their adviser, suggest?

### Rights of Non-Citizen Parents

A basic principle when serving families is that *parents have a constitutional, fundamental right to the care, custody, and control of their child*. The decisions of a fit parent are not to be interfered with except to prevent harm to the child. Troxel v. Granville, 530 U.S. 57 (2000). The Supreme Court extended that right to non-citizen parents residing legally in the U.S. Kaoru Yamataya v. Fisher, 189 U.S. 86, (1903). Therefore, a non-citizen parent should be able to avail themselves of the statutes allowing them to name whomever they choose as a guardian, just as a citizen parent does.

It's not only a parent's right, it's also their *responsibility* to name a successor at death or incapacity. A court should not have to decide who will raise a child simply because the parent failed to do so. In Colorado, there are no restrictions on who may be named: a guardian may be a citizen of another country. The Colorado Court of Appeals affirmed that proposition when it declined to overturn a trial court's decision to award custody to the mother in Switzerland. In Re McGee, 613 P.2d 348 (Colo. App. 1980).

Check your state's statutes and case law to determine if there are any qualifications of nominees—such as citizenship.

### When a Child is a U.S. Citizen

Judges don't like to lose jurisdiction over children in their courtrooms because they want to ensure their safety and care: This creates a potential barrier for moving a child to another country. To counteract that reluctance, parents must make their wishes clear about who will raise their child *and where*.

If a parent wishes a child to return to their country of origin, a judge will find greater reason to expatriate if the child is a citizen of that country. Even when a child is born on U.S. soil, parents should apply for dual-citizenship from their home country for their child. This has two effects: first, it indicates the parents' intent for their child to have connection to the home country; and second, it provides a basis from which guardians in the home country can request assistance from their own state department. Without dual citizenship, the home country's state department has little standing to assist with an expatriation.

If a parent wishes a child to remain in the U.S. but names a non-citizen guardian, it is unlikely that guardian will be permitted to remain in the U.S. by virtue of a guardianship alone. Parents must name a U.S. guardian or a person who would be entitled to emigrate for other reasons unrelated to a guardianship.

### Best Interests and the Hague Convention

Despite a parent's right to nominate a guardian—and a word of caution—a court can invoke both the "Best Interests" standard and the protections of the Hague Convention, ([http://www.hcch.net/index\\_en.php](http://www.hcch.net/index_en.php), last visited 12/4/2011), to retain custody over a child who would be returned to a country where they would be endangered or persecuted. Most of us will work with families from countries where endangerment is not a risk, but you should be aware of and counsel every non-citizen client of this caveat. Also, check the U.S. State Department's Travel Warn-

# Statutory Right to Name a Guardian

---

By: Martha J. Hartney, Esq.

ing list to see if the home country may pose a danger to the child: [http://travel.state.gov/travel/cis\\_pa\\_tw/tw/tw\\_1764.html](http://travel.state.gov/travel/cis_pa_tw/tw/tw_1764.html), last visited 12/5/2011.

## Interim Care

Because a child could be stuck in the U.S. for months while emigration is underway, parents should nominate a temporary guardian to serve for an extended period. A Kids' Protection Plan™ should request visitation for the new guardian while awaiting expatriation because the child should have the opportunity to bond with his or her new family.

Courts can't know what parents' wishes are—an omission remedied with a Kids' Protection Plan™. Our job is to help avoid protracted litigation by requesting the court expedite the return of the child to the country of origin in the care of the guardian in writing. I hope no child that I've planned for has to go through this process, but if so, I'd go to the mat for my clients' decision as to who should raise their child, and where.

About the Author:

*Martha's practice serves families with children and non-traditional families because she is committed to helping moms and dads bring their greatest gifts into parenting fearlessly and with joy. She knows legal planning for parents is part of the parenting journey and a primary responsibility to ensure that the children entrusted to us are cared for the way we want them to be should the unthinkable happen.*

*Martha graduated from the University of Denver while being a full time mother of two sons. She focused her studies on family, juvenile, and estate law and served in the Boulder County District Attorney's Office; Larimer County Domestic Courts; and the Rocky Mountain Children's Law Center. Martha has served as a pro bono guardian ad litem representing abused and delinquent children. After law school, she was certified as a Child & Family Investigator through the Colorado Bar Association. She has also supported new mothers as a La Leche League Leader and been an advocate of attachment parenting and natural parenting. You can reach Martha at [martha@hartneylaw.com](mailto:martha@hartneylaw.com) or visit her website at [www.hartneylaw.com](http://www.hartneylaw.com).*